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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

No. 682

INEZ RIDDLE McDONALD NEALE,

Petitioner,

vs.

EUGENE M. KINNEY and EDWARD McCAUSLAND, Co-Executors of the Will of EUGENE F. McDONALD, JR., Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

The Opinion Below and the Date of the Judgment Appealed From.

The only reported opinion in this case is that of the Appellate Court of Illinois under the title *McDonald* v. *Neale*, 35 Ill. App. 2d 140, 182 N. E. 2d 366, (1st Dist. 1962,) reprinted in full, Appendix I, pp. 25 to 38. The Supreme Court of Illinois denied leave to appeal from the decision

of the Appellate Court, without opinion. This order is set forth in full, Appendix II, pp. 39-40.

The Judgment sought to be reviewed is the denial by the Supreme Court of Illinois, on September 26, 1962, of leave to appeal from the judgment of the Appellate Court.

The Statute Conferring on This Court Jurisdiction over This Petition.

This Court's jurisdiction over this petition for *certiorari* is conferred by the United States Judicial Code, 28 U. S. C. §§ 1257(3), 2101 (1958), which authorize this Court to grant *certiorari* to review judgments of state courts where a right is specially set up or claimed under the Constitution of the United States, on petition filed within ninety days from the date of that judgment.

THE QUESTION PRESENTED.

1. PETITIONER'S HUSBAND OBTAINED A DECREE OF DIVORCE, CUSTODY OF THE PARTIES' TWO INFANT CHILDREN AND AN ADVANTAGEOUS PROPERTY SETTLEMENT IN THE SUPERIOR COURT OF COOK COUNTY, ILLINOIS. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT VITIATE THE DIVORCE, AWARD OF CHILDREN'S CUSTODY AND APPROVAL OF THE PROPERTY SETTLEMENT BECAUSE ONE OF THE THEN JUDGES OF THE SUPERIOR COURT OF COOK COUNTY, IN WHICH COURT PETITIONER'S HUSBAND SUED PETITIONER FOR DIVORCE, ACTED AS COUNSEL FOR PETITIONER'S HUSBAND?

2. IF SO, DOES THE DENIAL BY ILLINOIS COURTS OF RELIEF TO PETITIONER REST UPON "ADEQUATE STATE GROUNDS"?

THE CONSTITUTIONAL PROVISION INVOLVED.

". . . [N] or shall any state deprive any person of life, liberty or property, without due process of law . . . (U. S. Const. amend. XIV, § 1.

Explanation of References to the Record.

All references to abstract pages are to petitioner's Abstract prepared for use by the Supreme Court of Illinois. Nine copies of petitioner's Abstract and nine copies of respondent's Additional Abstract have been filed with the Clerk.

STATEMENT OF THE CASE.

Petitioner rests this application for *certiorari* upon undisputed facts.

The Nature of the Case.

In 1947 petitioner and her then husband Eugene F. McDonald, Jr., the father of her two children, became estranged and separated. Petitioner's husband enlisted one John A. Sbarbaro as his attorney in the matter of the parties' marital difficulties.

At that time Sbarbaro was a judge of the Superior Court of Cook County, in which court McDonald shortly thereafter obtained a divorce from petitioner and obtained custody of their two minor children.

It is undisputed that Sbarbaro acted as McDonald's attorney prior to *and pending* the suit for divorce.

On deposition Judge Sbarbaro testified that, acting for McDonald, he visited petitioner and her then attorney at petitioner's apartment and that almost immediately after Sbarbaro talked to her, petitioner, whose attorney previously had been "most vicious" in resisting Mr. McDonald's importunities for consent to a divorce and custody of the children, in that same conversation capitulated and acceded to those demands.

When petitioner's counsel in this proceeding called upon Judge Sbarbaro to produce correspondence with McDonald concerning the parties' relations, the attorneys of record for the respondents interposed a claim of "privilege of attorney and client" with respect to all correspondence and conversations between McDonald and Sbarbaro from June 1, 1947, until the death of McDonald in 1958. The trial court found that the confidential relationship existed as contended and sustained the claim of privilege.

It is further undisputed that Sbarbaro was reimbursed in money for traveling expenses incurred incidentally to the services that he rendered to McDonald as the latter's lawyer.

The Facts upon which the Writ of Certiorari is Sought.

All of the courts of Illinois having authority to pass upon the question (the trial court and the Illinois Supreme Court) ruled against petitioner's contention that Sbarbaro's activities as counsel in a matter pending in a Court of which he was a judge amounted to such coercion as to deprive petitioner of liberty and property without due process of law, in violation of the Fourteenth Amendment.

All quotations in this narration of undisputed facts are from the opinion of the Appellate Court of Illinois for the First District (Appendix I, *post*), the only written opinion in this case, or from the uncontradicted testimony of Judge Sbarbaro.

"Petitioner and respondent, Eugene F. McDonald, Jr., were married on July 16, 1931." (*Appellate Court's Opinion*, Appendix I, p. 26, *post*).

They became the parents of two children, "a daughter, then (at the time of the decree of divorce) ten and a son then five." (*Appellate Court's Opinion*, Appendix I, p. 26, *post*).

It is undisputed that the parties lived together until June 10, 1947, and therefore were *not* separated for more than one year next preceding September 23, of that year. The undisputed materials in the record establish this fact and are set forth in the margin.[1]

Illinois' then applicable statute on divorce (Ill. Rev. Stat. ch. 40, § 1 (1961)) required that for divorce on the ground of desertion, the errant spouse must have "wilfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, *for the space of one year.*" (Emphasis supplied.) Refusal to engage in sexual intercourse is not absence or desertion in Illinois. *Fritz* v. *Fritz,* 138 Ill. 436, 28 N. E. 1058 (1891). *Lindeman* v. *Lindeman,* 337 Ill. App. 261, 85 N. E. 2d 847 (1st Dist. 1949).

Notwithstanding this requirement of absence "for the space of one year", Mr. McDonald filed his suit for divorce on August 6, 1947, less than two months after the date of separation. (*Appellate Court's Opinion,* Appendix I, p. 26, *post.*)

Thus, the parties did *not* live apart from each other with or without reasonable cause on the part of either of them,

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[1] The petition herein alleged that the parties lived together uninterruptedly from the marriage until about the middle of June, 1947. (Abst. 2, 10, 11.) These allegations were not denied in respondents' answer (Abst. 41, 43, 44) and hence were admitted. "Every allegation . . . not explicitly denied is admitted . . ." Ill. Rev. Stat. ch. 110, § 40 (2) (1961). The fact also was established by respondents' sworn answers to interrogatories (Abst. 83, 509), and by testimony and exhibits, including memoranda from the husband to the wife delivered at their home as late as June 9, 1947. (Abst. 157, 180, 182, 238, 239, 295, 297, 509-514).

for more than one year prior to the time that the husband's suit for divorce was filed.

In the divorce action, Mr. McDonald never filed or otherwise asserted any charges or allegations of any grounds for divorce other than that he alleged desertion for more than one year.

But extra-judicially, Mr. McDonald accused petitioner of adultery.

Petitioner was represented by one Mr. Rathbun, a Chicago lawyer.

Mr. McDonald was represented by the counsel of record, none of whom was a judge of any court.

But as an adjuvant to the services of his counsel of record, Mr. McDonald enlisted the services of John A. Sbarbaro, then a judge of the Superior Court of Cook County, in which court McDonald's suit was pending.

All of the following quotations are from the testimony of Sbarbaro, who stated that he held the position of judge of the Superior Court of Cook County at the time that he testified. Judge Sbarbaro said,

> "I am a judge of the Superior Court of Cook County. I don't recall ever meeting Mrs. McDonald or that I was ever introduced to her." (Abst. 555.)

With respect to his acquaintance with petitioner's husband, Judge Sbarbaro testified:

> "I met McDonald sometime during my service as an assistant state's attorney under Robert E. Crowe in 1921, 1922, or 1923. I went into that office in 1921, and on the bench in 1926. It was in there, in one of those years. We became friends at about that time and so continued until his death in May, 1958." (Abst. 551.)

Sbarbaro testified concerning a conversation with petitioner and her attorney in the summer of 1947. At the

conclusion of this conversation petitioner immediately capitulated and agreed to surrender the custody of her two children. She agreed to her husband's terms as to the divorce settlement.

Sbarbaro says:

> "I believe that lawsuit was pending at that time. I am not sure whether it had been filed yet or not. I have reason to believe that it may have been." (Abst. 558.)

Judge Sbarbaro further testified concerning this conversation:

> "I told them after enumerating these charges [of adultery] and the people with whom this misconduct took place, and the places, that if it were true, these charges, that I thought she ought to give serious consideration pertaining to this question of custody because of the bad publicity it would reflect on everyone concerned, including her family, his family, his business. Then, I said if these were not true, that if I were she, I would tell my lawyer to tell him to do as he pleased, or words to that effect. Immediately, when I finished that statement, he said to her, 'Well, now damn it, is that true or not?' Rathbun was outspoken. I said that perhaps they had better not decide that there and that they might retire to another room. Then both of them retired to another room. **In about five minutes they returned and she said that she guessed that was all right, she would let him have the children at that time, and that was all that was said.** That statement was made by Mrs. McDonald. I recall nothing further that was said at that meeting." (Abst. 555-556.)

The further testimony of Judge Sbarbaro as to an earlier meeting is also illuminating:

> "At that meeting Rathbun gave no indication that he was not properly representing his client. He was very vicious and said he was going to go after Mc-

Donald. **But that was before the meeting.**" (Abst. 557.)

In short, in Judge Sbarbaro's own words, petitioner's attorney was very vicious and said he was going to go after McDonald *"but that was before the meeting."*

Immediately following this conversation with a judge in whose court McDonald's suit for divorce and custody of their children was pending, petitioner said that "she guessed that [the surrender of her children] was all right" and that "she would let him have the children at that time and that was all that was said." (Abst. 556.)

This conversation occurred in July or August, 1947.

Judge Sbarbaro also discussed the matter of attorney fees with the attorney representing petitioner:

> "After that meeting I had further talks with Rathbun about the matter. I don't remember whether it was here in my chambers or where it was. He talked to me about fees in this case and **I told him that I didn't think he would have any trouble getting a reasonable fee if he would only confer with McDonald's lawyer, who was Herriott.**" (Abst. 557.)

On July 21, 1947, the firm of McDonald's attorney of record issued two checks to Judge Sbarbaro, for $180.50 and $410.47, charging them to McDonald's account as "exp-Mackinac." (Petitioner's Exhibit 38, Abst. 520.) The judge had gone to Mackinac to see McDonald about the case. (Abst. 559.)

After these events and in September of that year, the following facts occurred (*Appellate Court's Opinion*, Appendix I, p. 26, *post*):

> ". . . upon being served with summons petitioner engaged an attorney, and on September 19, 1947, the matter was heard by agreement of the parties, 'on com-

plaint and answer as in cases of default.' The decree of divorce awarded respondent custody of their two children (a daughter then ten and a son then five), subject to rights of visitation by petitioner. The decree also approved the written agreement by which the parties settled their property rights. According to the agreement petitioner received the following: $125,000 in lieu of alimony, support, dower, and inheritance; $49,742 (or $34.00 per share) as consideration for assigning to respondent her title to 1463 shares of capital stock of Seneca Securities Corporation, a Delaware Corporation which controlled the Zenith Radio Corporation; $10,000 as consideration for her patent rights to an invention developed by respondent; $5,000 as consideration for the transfer to respondent of petitioner's interest in a residence, barn and other buildings known as the 'McDonald Residence' on Mackinac Island, Michigan, and for the assignment of her interest in the furniture, silverware, linens and other personal property in that residence; and 1,000 shares of the capital stock of Zenith Radio Corporation, which, according to the agreement, completed a previous gift of 1,100 shares, not theretofore fully delivered by respondent."

At the time of the divorce McDonald was worth between one million and two million dollars (Abst. 82, 523).

Sbarbaro was still a judge of the Superior Court of Cook County at the time of his deposition and he had not ceased to be McDonald's attorney until McDonald died.

According to Sbarbaro's deposition the question of opening up the case came up from time to time during the years following the entry of the decree and the judge and McDonald had many conversations about it. (Abst. 553.) Moreover, **the order entered by the trial court pursuant to motion by the respondents specifically found that a relationship in the nature of an attorney-client relationship existed**

between McDonald and the judge from June 1, 1947, until McDonald's death, concerning the matters in controversy in the case and that all correspondence, memoranda and conversations relating thereto were privileged. (Abst. 548-550.)

Sbarbaro continued to be a judge of the Superior Court of Cook County until the day after the trial court announced its decision in the present proceedings. Upon the day following that decision Sbarbaro was killed in an airplane crash while he was en route from Chicago to Florida.

In May, 1956, petitioner, presumably considering herself bereft of legal and, therefore, of social status as the wife of Mr. McDonald, married one William G. Neale (*Appellate Court's Opinion*, Appendix I, p. 33, *post*).

On May 15, 1958, Eugene McDonald died. He had not remarried.

On December 5, 1958, petitioner filed her application in the Superior Court of Cook County, which Court had entered the decree divorcing McDonald from petitioner, for vacation of that decree and for the vacating and setting aside of a post-marital property and monetary settlement entered into incidentally to the pronouncement of divorce.

The petition, as amended, averred that petitioner had been coerced into assenting to the divorce, loss of the custody of her children and the property settlement and that the property settlement was obtained as a result of fraudulent understatement of McDonald's wealth, and that petitioner's mental illness was such as to render her consent otherwise than voluntary.

Petitioner specifically invoked the due process clause of the Fourteenth Amendment in attacking the validity of the divorce decree. (Abst. 84.)

Respondent McDonald's Executors, joined issue of fact upon petitioner's allegations summarized above, and respondents further contended that petitioner was barred, not only with respect to her prayer for invalidation of the decree of divorce but with respect to her assault upon the post-marital property and monetary settlement, by lapse of time, by acceptance of her fits of the decree and by her subsequent marriage to Mr. Neale.

But Illinois, unlike other States, adheres to the rule that neither lapse of time *nor remarriage nor the death of the husband* bars a posthumous attack on a decree of divorce if in fact that decree is void. See authorities cited and discussed, this Petition, *post*, pp. 19-21. Therefore the Supreme Court of Illinois *must* have held, *not* that petitioner's attack upon the divorce was untimely, **but that the decree was valid despite Judge Sbarbaro's intervention as counsel in that case.**

The Trial Court resolved the issues of fact against petitioner at the close of her evidence and without hearing evidence from respondents.

Petitioner presented a direct appeal to the Supreme Court of Illinois and not to the Appellate Court of the State, under the provisions of the Illinois Civil Practice Act (Ill. Rev. Stat. ch. 110, § 75 (1961)) which, so far as pertinent here, authorized a direct appeal if, but not unless, a Federal or State Constitutional question was presented. See *Parker* v. *Illinois*, 333 U. S. 571 (1948).

But the Supreme Court of Illinois transferred this case to the Appellate Court on respondents' motion by memorandum order and without opinion. Under Illinois' principles of appellate jurisdiction such a transfer is an adjudication, binding upon the Appellate Court, that no constitutional question is involved. *Messina* v. *Department*

of Registration & Education, 37 Ill. App. 2d 250, 185 N. E. 2d 289 (1st Dist. 1962).

Under those principles the Appellate Court of Illinois had no jurisdiction to consider or pass upon petitioner's claims of Federal constitutional rights, *Pantle* v. *Pantle*, 19 Ill. App. 2d 353, 367, 153 N. E. 2d 740, 748 (1st Dist. 1958), and it did not do so.

The Appellate Court affirmed the decision of the trial court.

But it necessarily thus affirmed that decision without considering petitioner's contention that Sbarbaro's *admitted and undisputed* actions exerted such duress upon petitioner as to deny her due process of law; for when the Supreme Court of Illinois transferred this case to the Appellate Court, that order of transfer predetermined all consideration of all constitutional questions.

The Supreme Court of Illinois then denied petitioner leave to appeal.

TIME AND MANNER OF RAISING FEDERAL QUESTION.

In her petition filed in the State trial court, the same court in which Sbarbaro was still a judge, petitioner asserted various acts of fraud, including a stipulation to hear the case as a default matter, failure to make a defense to the divorce action, relinquishment of the custody of the children, surrender of valuable property rights, and obtaining a purported release of error. She further asserted that McDonald and his representatives successfully participated in the fraud, collusion, and conspiracy to deprive her of her rights. (Abst. 12-15). By amendment to the petition, petitioner alleged that the fraud, collusion, and conspiracy

complained of deprived her of her day in court and of her rights as wife of the plaintiff in said proceedings, without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. (Abst. 84-85.) The trial court dismissed the petition for want of equity at the close of petitioner's evidence. (Abst. 120.)

Petitioner appealed directly to the Supreme Court of Illinois in conformity with the Illinois practice, previously discussed, whereunder cases involving state or federal constitutional questions not only may be appealed directly but must so be appealed if waiver of the constitutional question is to be avoided.

The Supreme Court, without opinion, transferred the cause to the Appellate Court, which is without jurisdiction to decide constitutional questions. Nevertheless, in her brief in the Appellate Court, Appendix III, p. 41, *post*), petitioner urged denial of due process on the basis of Judge Sbarbaro's activities and did so again in her Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Illinois. (Appendix IV, p. 42, *post*.)[2]

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[2] Under Illinois appellate practice, "Neither an assignment nor a statement of errors is necessary." Illinois Supreme Court Rule 39, Ill. Rev. Stat. ch. 110, § 101.39 (1961).

REASONS RELIED UPON FOR GRANTING THE WRIT OF CERTIORARI.

I.

JUDGE SBARBARO'S INTERVENTION AS COUNSEL FOR PETITIONER'S HUSBAND, JUDGE SBARBARO BEING A JUDGE OF THE COURT IN WHICH THE HUSBAND SOUGHT AND OBTAINED DIVORCE, CUSTODY OF TWO MINOR CHILDREN AND AN ADVANTAGEOUS PROPERTY SETTLEMENT, DENIED PETITIONER DUE PROCESS OF LAW.

The *financial interest* of a judge who would be compensated by costs imposed on the defendant in the event of conviction but who would receive nothing in the event of an acquittal was held a denial of due process in *Tumey* v. *Ohio*, 273 U. S. 510 (1927). The Court there said (p. 532):

> ". . . [T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

Similarly, *emotional involvement* of the trial judge in the outcome of the case is a denial of due process according to *In re Murchison*, 349 U. S. 133 (1955).

In that case a judge sitting as a Michigan one-man grand jury charged a witness with perjury. Trial of the witness for criminal contempt before the same judge who brought the charge was held lacking in the fairness required by due process for the reason that (p. 136):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires

> an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered . . . ."

The significant aspect of both these cases is that a denial of due process was found in the existence of a set of circumstances regarded as creating a *probability* or the *appearance* of prejudice.

But in the instant case denial of due process does not consist alone or even primarily in the mere fact that Judge Sbarbaro acted as counsel in a case that was brought before the court of which he was a judge.

Denial of due process was inherent in the *coercive effect* that Judge Sbarbaro's actions had upon petitioner.

Judge Sbarbaro testified that he was a close friend of petitioner's husband (Abst. 551) but did not know petitioner.

Judge Sbarbaro testified that in a conversation with Mr. Rathbun (petitioner's attorney), Rathbun "was very vicious and said he was going to go after McDonald".

The judge adds very significantly, "but that was before the meeting" of Judge Sbarbaro with petitioner, Mr. Rathbun and petitioner's mother in petitioner's home.

At that later meeting, Judge Sbarbaro urged placating petitioner's husband, admonished her that "bad publicity would reflect on everyone concerned, including her [petitioner's] family, his [petitioner's husband's] family, his business."

Immediately after this conversation, petitioner and her attorney "retired to another room. In about five minutes

they returned and she said that she guessed that was all right, she would let him have the children at that time, and that was all that was said." (Abst. 555-556.)

Thus, whereas *before* the meeting between Judge Sbarbaro and petitioner in petitioner's home, her attorney was "very vicious" in his attitude toward petitioner's husband's efforts to divorce petitioner and take the children from her, *immediately after* that conversation with Judge Sbarbaro, petitioner and her attorney utterly capitulated to petitioner's husband's demands.

This further piece of testimony by Judge Sbarbaro is also very illuminating: "After that meeting [at which meeting petitioner had completely acceded to her husband's demands for an uncontested divorce and custody of the parties' two minor children] I had further talks with Rathbun about the matter. I don't remember whether it was here *in my chambers* or where it was. He [Rathbun] talked to me about fees in this case *and I told him that I didn't think he would have trouble getting a reasonable fee if he would only confer with McDonald's lawyer* . . .". (Abst. 557.)

In short, Judge Sbarbaro (1) found petitioner's counsel "very vicious" toward petitioner's husband until the conversation at petitioner's home, (2) successfully importuned upon petitioner and her lawyer to surrender completely to Mr. McDonald's demands, and (3) thereafter worked on the matter of fees to be paid to petitioner's counsel, not by petitioner but by her husband and her husband's other legal advisors.

As we have noted, Judge Sbarbaro continued to be a judge of the Superior Court of Cook County until his death after this case was heard.

Pending the pre-trial deposition of Judge Sbarbaro in this case, the trial judge sustained respondent's claim that Judge

Sbarbaro's conversations and correspondence between Mr. McDonald and Judge Sbarbaro were cloaked by the privilege of client and counsel.

Thus due process of law was *continuously* denied.

The last denial of due process in any trial court hearing this case occurred on November 20, 1959, about two months before the trial, when the trial judge refused to compel a fellow judge to disclose the contents of other documents, conversations and correspondence received from petitioner's husband because that judge was that litigant's lawyer!

Thus denial of due process, which had its inception when Judge Sbarbaro acted as counsel in the case that was brought in his own court, continued until Judge Sbarbaro, testifying as a witness in this proceeding and thereby impressing the dignity of his office upon the record in this case, was kept from testifying fully by the successful claim of the privilege of attorney and client.

This Court will not weigh contradictory testimony or assess credibility upon controverted questions of objective fact.

But this Court has steadfastly held that where *undisputed* objective facts constitute coercion or duress within the meaning of the Due Process Clause of the Fourteenth Amendment, due process is denied. *Reck* v. *Pate*, 367 U. S. 433 (1961), *Malinski* v. *New York*, 324 U. S. 401 (1945).

To be sure, the members of this Court do disagree from time to time as to whether a particular complex of undisputed facts is or is not so far instinct with duress as to amount to coercion. But no member of this Court has ever said or intimated that when duress or coercion emerges from *undisputed facts*, judgments resting upon that coercion can stand despite that duress.

The following language from *respondents' own answer* to petitioner's Petition for Leave to Appeal to the Supreme Court of Illinois may have had the effect upon that Court that it was intended to have but should devastate respondents' case here.

Respondents said at page 58 of that Answer that: "A vicious attack" is made upon "the late John A. Sbarbaro, a Judge of the Superior Court of Cook County from 1939 up until the time of his death. It is not hard to see why such an attack is made *because the testimony of the judge in his deposition completely destroys the petitioner's case.*" (Emphasis ours.)

Here respondents relied in the Supreme Court of Illinois upon Judge Sbarbaro's conduct, and upon information that he testified he had obtained as a result of his conjoint use of his judge's robes, his license to practice law, and the privilege of attorney and client to prevent cross-examination, in order, as respondents *themselves say*, "to completely destroy the petitioner's case".

If a judge may "give testimony that completely destroys" a litigant's case in his court and then withstand cross-examination on that testimony by the claim of privilege, due process is indeed denied.

II.

THE JUDGMENTS OF THE STATE COURTS DO NOT AND CANNOT REST UPON "ADEQUATE STATE GROUNDS" BECAUSE:

(A) ILLINOIS LAW PERMITS ATTACKS UPON DIVORCE AFTER THE DEATH OF THE HUSBAND AND BY A WIFE WHO HAS REMARRIED IF THE DIVORCES ARE IN FACT VOID; AND

(B) THE DENIAL OF DUE PROCESS IN THIS CASE CONTINUED INTO THE TRIAL OF THE PRESENT PROCEEDING, THEREBY FORECLOSING ANY CLAIM THAT PETITIONER IS BARRED BY LACHES.

Respondents will doubtless argue that, even if Judge Sbarbaro's conduct was such as to render the divorce in-

valid for lack of due process, the judgments of the courts of Illinois "rest upon adequate State grounds" because of petitioner's remarriage, her "acceptance of the benefits of the decree," the death of the husband, and lapse of time in asserting her rights.

A.

Illinois Law Permits a Wife to "Attack a Divorce Notwithstanding Her Remarriage and After Her First Husband's Death if the Divorce is in Fact Invalid."

It may be that the substantive law of some States is such that the remarriage of a party to a voidable or even a theretofore absolutely void decree of divorce works a "waiver" or "estoppel" so that the remarried spouse cannot attack a divorce.

But Illinois is not one of the States adhering to this rule.

Directly in point and absolutely decisive of this question is the case of

Collins v. Collins, 14 Ill. 2d 178, 151 N. E. 2d 813 (1958).

The *Collins* case cited above, is so incisively in point that we analyze it carefully:

Illinois' Divorce Act provided then as it provides now that as one of Illinois' grounds for divorce a spouse "has been guilty of habitual drunkenness for a space of two years" (Ill. Rev. Stat. ch. 40, § 1 (1961)).

Mrs. Collins obtained an *uncontested* divorce upon this statutory ground *at her instance*.

But at the time that the divorce was granted, the parties had been married for less than two years.

Mrs. Collins then remarried *and her divorced first husband died,* leaving a very large estate. Mrs. Collins was completely debarred from his estate if her divorce was valid but was entitled to a widow's share thereof if her divorce was void.

After Mrs. Collins' remarriage and *after* her divorced first husband's death, she brought a proceeding to set aside the divorce and to have herself declared her first husband's widow.

Of course the beneficiaries of Mr. Collins' trust estate, who would take the whole thereof if the divorce was valid, urged that lapse of time and Mrs. Collins' remarriage "waived", "estopped her from asserting" or in some other manner precluded her contention that the divorce was invalid.

But the Supreme Court of Illinois, differing in this respect with the decisions from sister States that were pressed upon the Illinois court in the important *Collins* case, held that the sundering of marital vows is so far touched by the State's public policy that the ordinary considerations of waiver by acceptance of the benefit of the decree do not apply.

The Supreme Court of Illinois set aside the Collins' divorce and reinstated Mrs. Collins as her first husband's widow **notwithstanding her remarriage during her first husband's lifetime.**

The *Collins* case differs from the instant case only in these respects:

In the *Collins* case, it was the wife, not the husband who procured the uncontested divorce. In the instant case, petitioner resisted her husband's importunities for divorce, custody of children and property settlement until Judge Sbarbaro's intervention in the matter.

In the *Collins* case, there was not even a claim that Mrs. Collins was the victim of any kind of duress, judicial or by private parties. On the contrary, it was she, not her husband, who sought the divorce.

In the *Collins* case, there was no claim that Mrs. Collins was mentally unwell or otherwise precluded from promptly disaffirming her divorce before "accepting the benefits thereof" by remarriage.

In this case, there was a claim of mental illness. To be sure, that claim propounded highly contested issues of fact and those issues have been resolved against petitioner and therefore they cannot and are not renewed here.

But those issues were resolved against petitioner upon a record in which, as respondents themselves successfully argued to the Supreme Court of Illinois, Judge Sbarbaro's testimony was to "completely destroy" petitioner's case.

B.

Any Claim that Petitioner is Barred by Laches is Foreclosed by the Continued Denial of Due Process Into the Very Trial of This Proceeding.

The denial of due process commenced when Judge Sbarbaro began his activities on behalf of Mr. McDonald at the time of the origin of the marital differences between the parties. This was in 1947, the year of the divorce.

The denial of due process continued until the death of the husband in 1958. The trial court, at the instance of respondents, specifically found that from about June 1, 1947, until the death of McDonald in May, 1958, "a confidential relationship" which was "in the nature of an attorney-client relationship" existed between McDonald and Judge Sbarbaro.

(Abst. 550.) Thus it is apparent that the conduct which fatally infected the proceedings in the first instance continued to do so throughout the remaining years of McDonald's life.

Nor did the denial of due process cease upon the death of McDonald. It continued as long as Judge Sbarbaro sat upon the bench, until his death the day following the trial judge's pronouncement that petitioner had no cause of action. It produced the successful claim of attorney-client privilege when Judge Sbarbaro's deposition was being taken, whereby petitioner was prevented from eliciting and the State courts from knowing facts which must have been known by respondents to be most damaging to their cause. And finally it culminated in the introduction in evidence by respondents of the judge's deposition which, thus circumscribed and tailored to the occasion, *"completely destroys the petitioner's case."*

Thus the denial of due process extended into the conduct of this very proceeding now sought to be reviewed.

III.

THIS CASE IS OF SUFFICIENT MOMENT TO ELICIT CERTIORARI.

The practice of law by judges needs the restraining influence of this Court. This case is more than a single instance of grievance which is of little national consequence. The situation in Illinois must be taken as an indication of disease in the judicial structure not confined to that State alone.

The Supreme Court of Illinois has shown a measure of sensitivity in this area but in all too limited a degree. Its approach has been solely through the avenue of its authority to regulate the practice of law, rather than a broad assertion of its power and obligation to keep the judicial process undefiled. In *Schnackenberg* v. *Towle*, 4 Ill. 2d 561, (1955)

a circuit judge was denied recovery of an attorney fee for advice rendered as to the conduct of a case in Sangamon county, he being elected in Cook county, since judges are interchangeable between circuits in Illinois. In *Bassi* v. *Langloss*, 22 Ill. 2d 190 (1961), this prohibition was extended prospectively to county judges practicing in circuit courts, they being qualified to preside in circuit courts.

Effective November 15, 1962, after denying petitioner leave to appeal, the Supreme Court of Illinois adopted Rule 59-1:

> **"Practice of Law by Judges.** No member of the Bar of this Court, who is a Judge of a Court of record shall, on or after December 3, 1962, engage in the practice of law while holding such office." (When printed this Rule will appear as Ill. Rev. Stats., Ch. 110, § 101.59-1.)

On November 27, 1962, the Supreme Court of Illinois so far reverted to a retrospective sanction of the practice of law by judges as to add the following to the Rule:

> "The completion of pending matters by Judges of City, Village, Town and Municipal Courts, who held office on May 16, 1961 (the date of this Court's opinion in *Bassi* v. *Langloss*, 22 Ill. 2d 190), will not be construed to be a violation of this Rule."

Measures such as these are grossly and obviously inadequate to correct the type of abuse which is apparent in the present case. The only appropriate and effective remedy is a pronouncement by this Court that a judgment into which activities of the kind here portrayed enter as a component is fatally defective as a violation of procedural due process.

PRAYER FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

For the reasons set forth in this petition, petitioner prays the grant of this Court's Writ of Certiorari to review or reverse the judgments of the Courts of Illinois in this case.

Respectfully submitted,

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APPENDIX I.

48292 35 Ill. App. 2d 140

Eugene F. McDonald, Jr.,
Plaintiff

vs.

Inez Riddle McDonald Neale,
Defendant

Inez Riddle McDonald Neale,
Petitioner-Appellant

vs.

Eugene M. Kinney and Edward McCausland, Co-Executors of the Will of Eugene F. McDonald, Jr., Deceased,
Respondents-Appellees.

Appeal from the Superior Court of Cook County

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This action was commenced on December 5, 1958, by Inez Riddle McDonald Neale, to set aside a divorce decree entered on September 23, 1947, and the stipulated property settlement incorporated therein. At the close of petitioner's evidence the trial court dismissed her claim for want of equity, and this appeal followed.

Petitioner and respondent, Eugene F. McDonald, Jr., were married on July 16, 1931. On August 6, 1947, respondent * instituted divorce proceedings on the grounds of desertion. Upon being served with summons petitioner engaged an attorney, and on September 19, 1947, the matter was heard by agreement of the parties "on complaint and answer as in cases of default." The decree of divorce awarded respondent custody of their two children (a daughter then ten and a son then five), subject to rights of visitation by petitioner. The decree also approved the written agreement by which the parties settled their property rights. According to the agreement petitioner received the following: $125,000 in lieu of alimony, support, dower, and inheritance; $49,742 (or $34.00 per share) as consideration for assigning to respondent her title to 1463 shares of capital stock of Seneca Securities Corporation, a Delaware Corporation which controlled the Zenith Radio Corporation; $10,000 as consideration for her patent rights to an invention developed by respondent; $5,000 as consideration for the transfer to respondent of petitioner's interest in a residence, barn and other buildings known as the "McDonald Residence" on Mackinac Island, Michigan, and for the assignment of her interest in the furniture, silverware, linens and other personal property in that residence; and 1,000 shares of the capital stock of Zenith Radio Corporation, which, according to the agreement, completed a previous gift of 1,100 shares, not theretofore fully delivered by respondent.

---

* Respondent, Eugene F. McDonald, died on May 15, 1958, and an order was entered substituting Eugene M. Kinney and Edward McCausland, co-executors of McDonald's estate, as parties to the action at bar.

Petitioner founds her right to recover upon the following propositions: first, that the decree of divorce is void on its face; second, that by virtue of § 72 of the Civil Practice Act [Ill. Rev. Stat. ch. 110, § 72 (1957)] the decree should be set aside on the grounds of fraud, duress and mental incapacity; and finally, that the property settlement, aside from the validity of the divorce decree, should be set aside on the grounds of fraud, duress and mental incapacity. We will discuss these alternative contentions in the order mentioned.

Petitioner argues that the decree is void because the evidence in the divorce proceedings plainly reveals insufficient grounds for divorce under the Illinois statute, and that the fatal defect can be observed on the face of the decree since it was parenthetically stated therein, "a certificate of which evidence having been duly signed and sealed is filed herein and made a part hereof."

It has long been the law of this state that a void judgment may be set aside at any time by motion or petition. [*Hustana* v. *Hustana*, 22 Ill. App. 2d 59, 64; Ill. Rev. Stat. ch. 110, § 72(7) (1961)]. The error importing voidness, however, must be apparent from an examination of the record, as the court cannot review the evidence. (*Evans* v. *Clement*, 14 Ill. 208; *Cullen* v. *Stevens*, 389 Ill. 35; *Collins* v. *Collins*, 14 Ill. 2d 178). The record, in a chancery case, consists of the pleadings, process and decree (*Collins* v. *Collins*, 14 Ill. 2d 178, 183). Although the evidence in the instant case was incorporated into the decree by reference and may thus be said to have become a part of the record, its character as evidence was not thereby changed and it cannot therefore be reviewed in this type of proceeding. The rule is founded upon sound considerations: "a re-examination of the evidence upon collateral attack would result in far-reaching

consequences, involving, among other things, the disturbing of titles long considered settled as well as weakening the jurisdictional presumption that has always obtained." *Cullen* v. *Stevens,* 389 Ill. 35, 42.

It is clear from the record in the divorce proceedings that petitioner was personally served, that she stipulated to have the cause heard as a default matter, and that she was represented by her counsel at the hearing. The decree found, as alleged in the complaint, that ". . . on, to-wit, June 1, 1945, the defendant wilfully deserted and absented herself from the plaintiff without any reasonable cause and without fault on his part, and has continued so to do without interruption for more than two (2) years since said date to the present time and the filing of the complaint herein." Petitioner would have us declare that the trial judge found that the statutory grounds of desertion and entered the decree on the basis of mistaken judgment. This we cannot do. (*Van Dam* v. *Van Dam,* 21 Ill. 2d 212). Petitioner's right to seek review of the transcript of evidence, on appeal or by writ of error, has long since passed. The record does not show on its face that the divorce decree was erroneous.

The principal question remaining concerns petitioner's allegations that she was mentally incompetent at the time of the execution of the property agreement and the entry of the divorce decree, that the settlement and decree were obtained by means of fraud and duress, and that she brought the instant suit within the allowable time after the fraud and duress came to an end. After hearing considerable testimony consuming about 5,000 pages of transcript, and after examining numerous exhibits and depositions the trial judge found that the evidence was not sufficient to justify vacating the decree upon these grounds.

At the outset petitioner contends that the trial judge erred in failing to consider the evidence in the proper manner at the close of petitioner's case, i. e., in the light most favorable

to petitioner, together with all reasonable inferences which can be drawn from the evidence. So considered, argues petitioner, the evidence clearly reveals a *prima facie* case of fraud, duress and mental incapacity. It is clear from the language of the statute that petitioner misinterprets the role of the trial judge in ruling on a motion presented under § 64(5) of the Civil Practice Act [Ill. Rev. Stat. ch. 110, § 64 (5)(1961)]. That section, as amended in 1955, provides that in equity and non-jury law cases the defendant may move for a finding in its favor at the close of plaintiff's case, and that "in ruling on the motion the court shall *weigh the evidence.*" This change in the Civil Practice Act, expressly for the purpose of expediting trials, permits the trial judge, at the close of plaintiff's case, to evaluate the evidence and determine the credibility of witnesses. Under such circumstances the trial judge must decide whether the inferences and conclusions adduced by him from the evidence result in a *prima facie* case before ruling on the motion. Our view of the trial judge's role here is substantiated not only by the plain language of the section and the historical notes pertaining thereto, but also by the view uniformly taken of the comparable provision found in Federal Rule 41 (b) [Fed. R. Civ. P. 41 (b)]* (*Allred* v. *Sasser*, 7

---

* Federal Rule 41(b) reads, in part, as follows:

After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

Cir., 170 F. 2d 233; *Penn-Texas Corp.* v. *Morse*, 7 Cir., 242 F. 2d 243, 246; *Chicago & Northwestern Ry. Co.* v. *Frocling Supply Co.*, 7 Cir., 179 F. 2d 133, 135). The trial judge was thus bound to give the evidence such weight as he believed it entitled to receive. We recognize, however, that great caution should be exercised by a trial judge before determining a law suit after having heard only one side of the case.

The petition in the instant case was filed more than eleven years after the entry of the divorce decree. At no time during that period did petitioner seek relief by way of a bill of review or writ of error *coram nobis*. Both of these procedural methods, upon which the period of limitation was one year, were superseded by the unified procedure provided in § 72 of the Civil Practice Act which became effective on January 1, 1956. The part of that section pertinent here reads:

> (3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

The instant petition was filed neither within the limitation period provided under the former practice nor within that afforded by § 72(3). Petitioner claims that the limitation period was tolled because of the continuing duress exerted over her by respondent, which did not terminate until May of 1958, when the respondent died. To sustain this position the petitioner offered testimony to show that she was seriously ill, with resulting weakness and nervousness, during the summer of 1947, and that consequently she was unable to comprehend or transact any important business matters at the time the property settlement was negotiated and the

divorce obtained. Further testimony was introduced to show that respondent was an unusually strong and domineering person, that he drank excessively during their marriage and frequently discharged firearms in a reckless manner, that he intimidated petitioner and her parents and caused them to fear him greatly, and that his duress continued through all the years that followed until respondent died, "because of the great fear that she had of severe physical injury or even death at his hands."

The evidence reveals that the petitioner was never declared or adjudicated insane; that shortly before the divorce proceedings petitioner and a friend, in anticipation of the money from the property settlement, made plans to enter a photography business in Jacksonville, Florida, and after the entry of the decree consummated those plans and actively engaged in said business; and that petitioner subsequently worked as a private secretary for General Omar Bradley who testified that petitioner was "perfectly capable" and not insane during the time she worked for him from November, 1954 to March, 1957. There was no showing of duress stemming from respondent's drinking and use of firearms after the termination of the marriage. During the eleven years after the entry of the divorce decree petitioner and her parents carried on extensive correspondence with the respondent, and none of these letters revealed that petitioner and her parents felt themselves subject to threats or duress. Indeed, on March 12, 1948, petitioner wrote to respondent, shortly after opening her photography studio in Florida:

March 12, 1948

Dear Gene:

Had your lovely letter reached me yesterday it could have saved me real disappointment as I awaited in vain

a message from you on that all-important day. I note that your letter was dictated on the eighth and posted on the ninth by ordinary mail. That your good wishes were three days on the way was certainly no fault of yours and in no way due to a lack of thoughtfulness on your part.

I am sending you under separate cover Trabue's first formal newspaper advertisements. (We were previously mentioned twice in the "Chatter" column of Society Reporter Alice Withee). I am also enclosing a photograph of me taken on the night of my opening with Mr. Stewart, Eastman's special representative. We are looking at a color photograph (Eastman Ektachrome Dye Transfer process) of the pin you gave me designed by Frisch. As it is in the form of a Lily, you will note that two lilies were photographed with it—all in the spirit of the Easter Season. I am sorry you cannot see a close-up, as the delicate tracery of the veins in the petals of the lily are plainly reproduced.

The opening was a huge success and very well attended. I am glad you approved my choice of the lucky eleventh.

All the best,
Inez.

On several occasions during the eleven year period petitioner consulted attorneys about filing proceedings to vacate the divorce decree and to obtain custody of her children. No action ever resulted from these conferences. Petitioner's father testified that on each of those occasions the respondent called him threatening to publicize scandalous facts about petitioner's adultery during their marriage (which charges had been voiced to petitioner, her parents and her attorney prior to the divorce proceedings) and warning that newspapers throughout the country would publish this information to the humiliation of petitioner, her parents and her children. The father admitted, however, that on one of

these occasions in 1955, his reply to respondent was to the effect that he (the father) couldn't do anything about it. The trial judge could well have inferred that, unless such threats and charges against petitioner were true and she feared exposure, they would have had no effect upon petitioner and her parents, and in fact she would not have relinquished custody of her children in the first place. The trial judge could likewise have concluded that even if the charges were untrue they would not deter one genuinely seeking the custody of her children, but rather would induce her to seek the much needed judicial relief. In any event, the trial judge had before him ample evidence to support the finding that petitioner was not mentally incompetent throughout the eleven year period and was not subjected to, or affected by, threats and pressures sufficient to constitute legal duress. Accordingly, it is our view that the trial judge properly determined that the period of limitations under §72(3) was not tolled and that petitioner's claim is therefore barred.

We are also of the opinion that the trial judge correctly ruled upon another question which is equally dispositive of this controversy. The trial judge determined:

> that, subsequent to the entry of the instant decree, the petitioner, acting free of any duress and as her own free and voluntary act, in May of 1956, two years before the death of Eugene F. McDonald, Jr., married one William G. Neale at Phoenix, Arizona; that such marriage was consummated in reliance upon the validity of the instant decree; and that petitioner therefore accepted the benefit of said decree and is estopped to attempt to vacate the same or set it aside in this proceeding.

This rule of estoppel has been followed repeatedly by courts of this and many other states. (*Scase* v. *Johnson*, 130 Ill. App. 35; *Pierotti* v. *Pierotti*, 343 Ill. App. 116; see also, *Red-*

iker v. *Rediker*, 35 Cal. 2d 796, 20 A. L. R. 2d 1152 and authorities cited therein). Petitioner accepted the proceeds of the property settlement and put them to her own use. As respondent had died when petitioner filed her claim, no question of her status as a wife is involved. All she seeks is an additional portion of respondent's assets. Petitioner remarried in 1956 thereby relying upon and asserting the validity of the divorce decree. Her second marriage continued to exist in all respects at the time she filed this petition in 1958. She had not annulled it, nor had she disavowed it in any way at any time other than in the instant suit which was filed solely for the purpose of obtaining part of respondent's estate. The rule of estoppel, founded upon the public policy of protecting the marital status and good character of innocent third persons, the legitimacy of children, and the rights and position of persons whose status has been finalized by decree of divorce, will not permit parties to assert inconsistent legal rights as petitioner has here attempted. Under the facts of this case the rule of estoppel was appropriately applied.

Petitioner cites *James* v. *James*, 14 Ill. 2d 295, and *Collins* v. *Collins*, 14 Ill. 2d 178, to support her view that she is not estopped to maintain these proceedings by reason of having accepted the financial benefits of the decree and having remarried. Neither case squarely meets the issue as it is presented under the instant facts. In *James* the question was confronted on an appeal. The petition to vacate was filed within 30 days of the entry of the decree under section 50(6) [Ill. Rev. Stat. ch. 110, § 50(6)(1957)] while the trial court still had full control over the decree and jurisdiction to vacate or modify it. Also, the petitioner, when filing during the 30 day period, offered to do equity by returning the amount received or by doing whatever the court deemed just and reasonable. Under those facts it is clear

that in James there amounted to no acceptance at all in contrast to the kind of acceptance and use of the financial benefits of the instant decree which would indicate acknowledgment of and reliance upon the decree and thus give rise to estoppel. The James matter was heard as a continuing aspect of the original litigation and within such time and under such circumstances that the party opposing the appeal had thereby suffered no detriment. Thus the Supreme Court held that the acceptance of payments for herself and her attorney would not bar petitioner from appealing from the decree where, within 30 days from the entry thereof, petitioner had offered to do equity in the manner indicated above. Certainly, under the facts at bar previously discussed in this opinion, that is not the question before us. In *Collins* the Court's language concerning the effect of petitioner's remarriage upon her right to collaterally attack the decree was stripped of its significance when the Court pointed out that "this issue was not presented to the lower court for consideration, and is obviously waived." *Collins* v. *Collins*, 14 Ill. 2d 178, 185.

Were we to rule favorably for petitioner upon each of the foregoing questions, we would still be compelled to hold that the trial judge properly dismissed the petition, because we find substantial evidentiary support for the conclusion that petitioner did not establish her case of fraud, duress, and mental incapacity, despite the fact that respondent, his attorney, and petitioner's attorney were not alive to give testimony. The evidence damaging to petitioner's cause was elicited through cross-examination and from the introduction of depositions and exhibits which had been used in part by petitioner.

It appears that upon the recommendation of Howard Ellis of the firm of Kirkland, Fleming, Green, Martin and El-

lis, petitioner and her father (who was a banker) employed Charles F. Rathbun to represent her in her marital dispute and paid him a retainer of $1,500.00. Petitioner claimed that Rathbun fraudulently colluded with respondent, in derogation of petitioner's interests, in (1) receiving $25,000 in attorney's fees from respondent without disclosing that fact in the court proceedings; (2) permitting petitioner to agree to a property settlement which was grossly inequitable in light of respondent's great wealth, and which amounted to virtually nothing when set off against the value of the property petitioner turned over to respondent; and (3) inducing petitioner not to contest the charge of desertion when Rathbun knew the parties had been living under the same roof until shortly before the divorce action was instituted.

Petitioner does not contend that respondent had anything to do with the selection of Rathbun as her attorney. There was evidence indicating that petitioner and her father were notified that respondent would be willing to pay Rathbun's fee, if not prior to the execution of the property settlement, at least prior to their receipt and acceptance of the money stemming from the settlement. In February of 1948, many months after the entry of the divorce decree, petitioner's father wrote Rathbun thanking him for all the nice things he had done for petitioner. Moreover, the father admitted that at no time during Rathbun's life did he accuse the latter of having defrauded petitioner.

The evidence offered to show that petitioner did not know respondent's financial worth was highly inconclusive. On the other hand, there was evidence indicating that petitioner, her parents and her attorney were informed that respondent possessed evidence of adulterous conduct on behalf of petitioner, and that when confronted with this in-

formation petitioner, after privately conferring with her attorney, did not deny the charges and consented to allow respondent to have custody of the children at least temporarily. Thereafter petitioner signed the property settlement agreement which, in addition to the terms of the property settlement, recited that the parties "have not cohabited or lived together as man and wife for upwards of two (2) years . . ." that subject to court approval petitioner agreed "that the custody of the two minor children of the parties may be awarded to First Party [respondent], subject to her right of visitation . . ." and that petitioner "has relied entirely upon her own knowledge and investigation of the financial condition of her husband." Although petitioner introduced voluminous testimony of doctors, psychiatrists, and others to show that she was mentally incompetent and under duress at the time the divorce negotiations transpired, and that these conditions continued to the time of respondent's death, yet it is clear that no one considered it necessary at any time to have a legal guardian appointed for her. Moreover, petitioner had the benefit of her parents' close attention and assistance in all that took place. And as for respondent's influence in the transactions, it is quite clear that all the documents were signed by petitioner out of the presence of respondent. We think the trial judge properly concluded that "in the face of such charge of adultery not denied by petitioner, her attorney, Rathbun, obtained all the relief in her behalf that he could reasonably have been expected to obtain by way of property settlement, alimony, [and] custody of the minor children. . . ."

Upon the law and the facts before us we hold that respondent's motion to dismiss at the close of petitioner's case was properly granted. In view of our conclusions we

find it unnecessary to consider other questions which have been argued. The judgment of the trial court is therefore affirmed.

Affirmed.

MURPHY, P. J. and
ENGLISH, J. concur.

APPENDIX II.

DENIAL OF LEAVE TO APPEAL FROM THE JUDGMENT OF THE APPELLATE COURT.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS } ss.
SUPREME COURT }

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the tenth day of September in the year of our Lord, one thousand nine hundred and sixty-two, within and for the State of Illinois.

Present:

Roy J. Solfisburg, Jr., Chief Justice.

Justice Joseph E. Daily.

Justice Harry B. Hershey.

Justice Byron O. House.

Justice Walter V. Schaefer.

Justiee Ray I. Klingbiel.

Justice Robert C. Underwood.

William G. Clark, Attorney General.

Robert G. Miley, Marshal.

Attest:

Mrs. Earle Benjamin Searcy, Clerk.

BE IT REMEMBERED, that, to-wit: on the 26th day of September 1962, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Eugene F. McDonald, Jr., vs. Inez Riddle McDonald Neale. Inez Riddle McDonald Neale, Petitioner No. 37321 vs. Eugene M. Kinney and Edward McCausland, Co-Executors of the Will of Eugene F. McDonald, Jr., Deceased, Respondents.	Petition for Leave to Appeal from Appellate Court, First District. 47 S 12849. 48292.

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioner costs by them in this behalf expended, to be taxed, and that they have execution therefor.

APPENDIX III.

BRIEF FOR APPELLANT IN THE APPELLATE COURT OF ILLINOIS, pp. 165-166.

* * * * * * *

In accordance with these principles, petitioner was denied due process in the divorce proceedings in the following respects: * * *

5. By the extra-judicial activities of a member of the same court before which her case was pending. The most charitable interpretation of Judge Sbarbaro's activities is that it constituted the giving of advice, not sought by petitioner but thrust upon her as a result of improper representations made to Judge Sbarbaro, with the inevitable effect of impairing her independence of judgment and action. The worst interpretation is that it was an effort by the court itself, of which he was a member, to deprive her of her rights.

APPENDIX IV.

PETITION FOR LEAVE TO APPEAL FROM THE APPELLATE COURT TO THE SUPREME COURT OF ILLINOIS, pp. 41, 42, 43, 44.

* * * * * *

The extra-judicial activities of a member of the same court deprived petitioner of due process.

The conduct of Judge Sbarbaro in connection with the divorce proceedings, standing by itself, is sufficient to raise serious question as to the validity of the decree. He was a member of the court before which the case was tried. From June 1, 1947 to May, 1958, he acted as attorney for McDonald in the matter. His motive in acting as he did is immaterial. He testified McDonald, his close friend (A. 551), asked him "to do something in connection with the case" (A. 559). As a judge of the Superior Court of Cook County, the court in which the divorce action was filed and heard, he could not properly have any connection with the parties to the litigation. He acted as attorney for McDonald, though he did not appear of record in that capacity. He was not a friend of and, in fact, did not know Mrs. McDonald, even by sight. * * *

Due process requires that the tribunal be impartial, *Smith* v. *Department of Registration and Education*, 412 Ill. 332 (1952), that court officers act impartially. *Thompson* v. *People*, 410 Ill. 256, 260 (1951), and that all proceedings be had in open court, *People ex rel. Bernat* v. *Bicek*, 405 Ill. 510 (1950), *People* v. *Rivers*, 410 Ill. 410 (1951), *Albert* v. *Albert*, 340 Ill. App. 582 (1st Dist. 1950). Rather than conforming with these standards, this conduct was "so pregnant with evil as to be against public policy," and calculated to frustrate the efforts of the courts "to maintain the fidelity and integrity of the courts and the confidence of the public whom they serve in a position of trust." *Schnackenberg* v. *Towle*, 4 Ill. 2d 561, 565, 566 (1955).

Office-Supreme Court, U.S.
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JAN 19 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

No. 682

INEZ ODLE McDONALD NEALE,
Petitioner,

vs.

EUGENE M. KINNEY AND EDWARD McCAUSLAND, CO-EXECUTORS OF THE WILL OF EUGENE F. McDONALD, JR., DECEASED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OF RESPONDENTS IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

No. 682

INEZ RIDDLE McDONALD NEALE,
Petitioner,

vs.

EUGENE M. KINNEY AND EDWARD McCAUSLAND, CO-EXECUTORS OF THE WILL OF EUGENE F. McDONALD, JR., DECEASED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OF RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The trial court delivered no opinion but entered detailed findings of fact and conclusions of law (Ad. Ab., pp. 97-117).* The *per curiam* opinion of the Illinois Supreme Court denying a direct appeal for lack of a constitutional question and transferring the cause to the Illinois Appellate Court, First District, is unreported and is printed in Appendix A hereto, *infra*, pp. 25-26. The opinion of the

* Unless otherwise indicated all record references are to respondents' printed abstract of record.

Illinois Appellate Court, First District, (Appendix I to Petition) is reported at 35 Ill. App. 2d 140, 182 N. E. 2d 366. The Illinois Supreme Court denied leave to appeal from the decision of the Appellate Court without opinion (Appendix II to Petition).

JURISDICTION.

Petitioner improperly invokes the jurisdiction of this court to review the judgment of the Illinois Supreme Court denying leave to appeal from the judgment of the Illinois Appellate Court, First District, pursuant to 28 U. S. C. § 1257 (3) because the constitutional question presented by her petition was never raised before any Illinois court having authority to entertain the same. See Argument, *infra*, pp. 10-13.

STATUTES AND RULES INVOLVED.

In addition to the constitutional provision set forth in the petition, Illinois Civil Practice Act, §§ 72 and 75(1) (Ill. Rev. Stat. (1961) Ch. 110, §§ 72, 75(1)) and Illinois Supreme Court Rules 39 and 47 (Ill. Rev. Stat. (1961) Ch. 110, §§ 101.39, 101.47) are pertinent. These provisions are set forth in Appendix B hereto, *infra*, pp. 27-29.

QUESTIONS PRESENTED.

1. Whether petitioner can invoke the jurisdiction of this court pursuant to 28 U. S. C. § 1257 (3) when the constitutional question presented by her petition for writ of certiorari was never raised in any court below having authority to entertain the same and when no constitutional question whatsoever was passed upon by any court below.

2. Whether petitioner was denied due process of law

because at or about the time of the divorce case in 1947 in which petitioner's husband was represented throughout by a well-known Chicago lawyer, petitioner's own counsel sought out a judge other than the one before whom the case was pending and requested that judge as a personal friend of petitioner's husband to discuss the marital difficulties of the parties with him and his client.

3. Whether any constitutional question was decided when the court below refused to set aside a divorce in proceedings first instituted by petitioner eleven years after entry of the divorce decree and only after her former husband's death, all courts below having found petitioner to have been under no legal disability, to have been represented by counsel of her own choosing, to have participated in the divorce proceedings, to have received and kept a substantial property settlement, and to have remarried in reliance upon the divorce decree.

STATEMENT OF THE CASE.

The question now presented for the first time by petitioner and the statement of the case contained in her petition gives an utterly false impression of the real issues and record facts in this cause.

Petitioner would have this court believe that one of the then judges of the Superior Court of Cook County acted as lawyer for petitioner's husband in divorce proceedings against petitioner in the very court in which he was sitting. Nothing could be further from the truth. Actually the record unequivocally establishes that petitioner's husband was represented in the divorce proceedings by a well-known Chicago lawyer and member of the bar of this court by the name of Irving Herriott, now deceased. No judge of the Superior Court of Cook County except the late Judge Sabath, who presided, participated in any manner in the divorce proceedings.

Petitioner's assertion in her statement of the case (Pet., p. 3) that she rests her "application for certiorari upon undisputed facts" is utterly false because practically every statement made by her is not only disputed but is shown by the record to have been found false by the trial court, the three judges of the Appellate Court, and in effect by the seven judges of the Illinois Supreme Court.

The actual issues raised by petitioner and the facts found with respect to those issues are set forth in detailed findings prepared by the trial judge and in the opinion of the Appellate Court. They establish that absolutely no constitutional question of any kind was ever passed upon by any court below and that the complaint to vacate the divorce decree pursuant to Illinois Civil Practice Act § 72, filed by petitioner eleven years after her divorce and two years after her second marriage, was barred by limitations, laches, and estoppel. We refrain from burdening the court with a further recital of these issues and findings, and limit our statement to the actual record facts material to the purported constitutional question petitioner now seeks to raise for the first time with regard to Judge Sbarbaro.

The Facts with Regard to Judge Sbarbaro.

Petitioner begins her statement of "undisputed facts" with the assertion that "[p]etitioner's husband enlisted one John A. Sbarbaro as his attorney in the matter of the parties' marital difficulties" (Pet., p. 3). The implication intended is that Sbarbaro was McDonald's attorney in the divorce proceedings. The trial court found that petitioner's husband was represented throughout the entire proceedings by Irving Herriott, a lawyer known to this court, now deceased (Finding 23, Ad. Ab. 112). *Sbarbaro at no time acted for McDonald in the divorce proceedings.* Judge

Sbarbaro, testifying by deposition as petitioner's witness, said:

> "I was not present before Judge Sabath during the McDonald divorce proceeding" (Ad. Ab. 756).

The petition next states it to be "undisputed" that Judge Sbarbaro acting as McDonald's lawyer, sought out the petitioner to coerce her into a divorce settlement (Pet., p. 3). The record shows that nothing of the kind happened. What he actually testified to was that he had been a lifelong friend of petitioner's husband, the late Commander Eugene F. McDonald, Jr. (Ad. Ab. 741); that this fact was known to Rathbun, the petitioner's lawyer (Ad. Ab. 745); that Rathbun knowing of this connection sought out Sbarbaro and made threats against McDonald believing that this would result in the communication of the threat to McDonald (Ad. Ab. 743); that Rathbun was very vicious and threatened to break up a Zenith Radio Corporation stockholders' meeting by making charges against McDonald who was president of the company (Ad. Ab. 747); that the obvious reason Rathbun had for seeking out Sbarbaro was to get the "message" to McDonald. Since petitioner read Judge Sbarbaro's deposition into evidence, under Illinois law she thus sponsored the witness and is bound by this testimony. *Penn. R. R. Co.* v. *The John Anda Co.*, 131 Fl. App. 426, 430-1.

Testifying as to how the meeting between himself and the petitioner, Mrs. McDonald, was brought about, Sbarbaro said (Ad. Ab. 747): Rathbun was "very vicious * * * He told me he going after McDonald and was going to ruin him. He said he was representing Mrs. McDonald. I told him before he made any such statement he should go into the case a little more thoroughly, because when he learned some of the truth about it on the other side, he might not feel so anxious to carry out his objective." Sbarbaro further said that he had told Rathbun "that

McDonald had proof of many acts of misconduct and that I thought he should know about them" (Ad. Ab. 751).

Subsequently, Rathbun contacted Sbarbaro and told him (Ad. Ab. 748) "that he would like to have [him] come up and talk with Mrs. McDonald in his presence." He further testified (Ad. Ab. 750): "As to the meeting I don't know whether I went to the apartment with any specific intention *except of following the suggestion made by Rathbun* that I meet with both of them and explain to her what I had told Rathbun about the charges that McDonald said he was going to make in any proceeding that might come up on the question as to the custody of the children" (Emphasis supplied).

At the meeting at Mrs. McDonald's apartment, arranged by her own attorney, Sbarbaro testified the following occurred (Ad. Ab. 752-753): "It is my recollection that on that visit I related in Mrs. McDonald's presence and within her hearing certain specific things pertaining to her alleged misconduct; that is, naming persons and places and dates." Sbarbaro further testified that the reason Rathbun gave for having him come to petitioner's apartment was that "[i]f these accusations that McDonald is making against my client are true, I want to know about it and I want my client to know about it" (Ad. Ab. 752).

After the charges of adultery and the specific facts upon which they were based had been stated by Sbarbaro, petitioner and her attorney conferred together in a separate room (Ad. Ab. 746-6). *Petitioner at no time had denied the charges.* After about a five minute conference with her attorney petitioner returned to the room in which Sbarbaro was waiting and said that McDonald could have the children (Ad. Ab. 746, 754).

At this meeting Sbarbaro also told petitioner in her lawyer's presence that if the McDonald charge that she had

committed adultery was not true, then "[i]f I were you, I would tell your lawyer to tell him [McDonald] to do as he pleased or words to that effect" (Ad. Ab. 745).

The present assertion of a constitutional question by petitioner is based on her claim that Sbarbaro's activities "amounted to such coercion as to deprive petitioner of liberty and property, without due process of law, in violation of the Fourteenth Amendment" (Pet., p. 4).

Whether or not petitioner was the victim of coercion was a question of fact decided against her by the trial court and again by the Appellate Court of Illinois. In dealing with this issue the trial court said (Finding 25; Ad. Ab. 113):

> "That no evidence has been presented by petitioner that she was induced by fraud to enter her appearance in the divorce proceeding docketed as above, but, on the contrary, the record shows that she was personally served with process and was represented in these proceedings by independent counsel of her own choosing; nor is there any evidence that she was defrauded in the property settlement merged in said decree; nor is there any showing of fraud or collusion made out against her attorney, Charles F. Rathbun, or against Irving Herriott, or against Eugene F. McDonald, Jr. and the court finds all such charges of collusion unproven and not sustained by the evidence in this case."

The trial court also found (Finding 14; Ad. Ab. 107):

> "* * * [T]here is no evidence that petifioner ever saw Eugene F. McDonald, Jr. after the 14th of June, 1947, up to and after the divorce decree was entered in the above entitled case, nor is any act of duress of any kind by McDonald, *or anyone acting on his behalf*, shown or proven during such period of time, or at any time, which caused the execution by petitioner of the aforesaid documents or any other documents concerned with the property settlement." (Emphasis supplied.)

The charge now for the first time made in this court that the conference between Judge Sbarbaro, petitioner and her counsel which took place in July of 1947, constitutes such coercion as to deprive her of due process of law cannot be sustained as a matter of law in the face of these findings of fact of the trial court.

The conclusion of law on this issue entered by the trial court and affirmed by the Appellate Court also shows this to be so. Such conclusion was that petitioner could not utilize evidence existing at the time the decree was entered to attack the divorce decree, the court saying (Conclusion 9; Ad. Ab. 116):

> "* * * [H]owever, petitioner seeks here to prove coercion, duress and fraud by evidence which could have been presented to the court by petitioner's own attorney during the divorce proceedings, at which time a full explanation of the facts could have been made and full protection given to her rights."

In commenting on these findings and conclusions, the Appellate Court of Illinois said (Pet. App. I, p. 37):

> "We think the trial judge properly concluded that 'in the face of such charges of adultery not denied by petitioner, her attorney, Rathbun, obtained all the relief in her behalf that he could reasonably have been expected to obtain by way of property settlement, alimony [and] custody of the minor children.' * * *"

The Appellate Court also found that (Pet. App. I, p. 35):

> "The evidence damaging to petitioner's cause was elicited through cross-examination and from the introduction of depositions and exhibits which had been used in part by petitioner."

It is stated at page 4 of the petition that "[a]ll of the courts of Illinois having authority to pass on the question" found that Sbarbaro had not coerced the petitioner in any way. It thus appears from petitioner's own statement of

the proceedings below that this court cannot ever reach any question remotely resembling a constitutional question without reversing all the courts of Illinois on the facts. If as found by the Courts below there was no coercion of petitioner, then obviously no constitutional question could ever exist.

ARGUMENT.

I. THE CONSTITUTIONAL QUESTION PRESENTED WAS NEVER PROPERLY RAISED IN THE COURTS BELOW.

We most respectfully suggest that this court has no original jurisdiction to rule on a constitutional question in a case coming from a state court. To present such a question on petition for writ of certiorari pursuant to 28 U.S.C., § 1257 (3), petitioner must show that the question was properly raised and decided against her by the highest court of the state in which a decision could be had. The alleged constitutional question presented is defined by petitioner as follows (Pet., p. 4):

> "All of the courts of Illinois having authority to pass upon the question (the trial court and the Illinois Supreme Court) ruled against petitioner's contention that Sbarbaro's activities as counsel in a matter pending in a Court of which he was a judge amounted to such coercion as to deprive petitioner of liberty and property without due process of law, in violation of the Fourteenth Amendment."

No such question was ever presented for decision to either the trial court or the Illinois Supreme Court.

Petitioner's complaint to set aside the divorce decree, as originally filed in the trial court, presented no constitutional question whatever (Ad. Ab. 1-20). It was devoted entirely to a recital of alleged acts of cruelty, fraud, perjury and collusion by her counsel. Later during the trial petitioner obtained leave to file an amendment which alleged that she was denied due process of law through the introduction of perjured testimony at the original divorce hearing and by reason of the various acts complained of

in her complaint (Ad. Ab. 94). But neither her complaint nor her amendment thereto ever alleged in any manner that she was denied any constitutional right by reason of Judge Sbarbaro acting as a lawyer for her then husband. Judge Sbarbaro was not even named or mentioned or referred to in any way.

The findings of fact and conclusions of law entered by the trial court at the conclusion of the trial further demonstrate that no constitutional question of any kind was decided in this proceeding (Ad. Ab. 97, 114). The trial court was not thereby evading any such question because even the proposed findings and conclusions submitted by petitioner contained absolutely no reference to Judge Sbarbaro or any constitutional question with reference to him (Petitioner's Abstract of Record, pp. 87-99).

Following dismissal of her complaint petitioner prosecuted a direct appeal to the Illinois Supreme Court (Ad. Ab. 118) and respondents moved (App. C., p. 30) to transfer the appeal to the Appellate Court, First District, on the ground that no constitutional question was presented by the decision of the trial court.*

Petitioner filed a brief in opposition to the motion in

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* Under Illinois Appellate practice all appeals involving both federal and state constitutional questions must be taken directly to the Illinois Supreme Court and the Appellate Courts of Illinois have no jurisdiction to entertain such questions. Illinois Civil Practice Act, § 75(1) (Ill. Rev. Stat. (1961) Ch. 110, § 75(1)), set out in Appendix B hereto, *infra*, p. 28. This court took notice of this practice in deciding *Parker* v. *Illinois*, 333 U. S. 571, 573-4 and *Central U. Teleph. Co.* v. *Edwardsville*, 269 U. S. 190, 194. See also *Pantle* v. *Pantle*, 19 Ill. App. 2d 353, 367, 153 N. E. 2d 740, 748.

Illinois Supreme Court Rule 47 (Ill. Rev. Stat. (1961) Ch. 110, § 101.47) set out in Appendix B hereto, *infra*, p. 29, provides that any cause improperly appealed (viz., for lack of a constitutional question) shall be transferred to the proper court on motion and "[t]he case shall proceed from that point in all respects as though the appeal had originally been taken to the proper court."

which she again raised the same constitutional charges set out in her trial court amendment to the complaint (App. D, p. 31). Judge Sbarbaro was not named or mentioned or referred to in any way and again no question was raised with regard to him in any part of her brief.

Under established Illinois practice assignments of error are no longer necessary but a party must set forth in his brief the points on which he relies and all other points are deemed waived. Illinois Supreme Court Rule 39 (Ill. Rev. Stat. (1961) Ch. 110, § 101.39) set forth in Appendix B. *infra*, p. 29. See *Withers* v. *City of Granite City*, 23 Ill. 2d 156, 158, 177 N.E. 2d 181, 182.

This court has recognized the Illinois practice in this regard and has refused to review questions which have not been presented in a petitioner's brief before the Illinois Supreme Court. *Hulbert* v. *Chicago*, 202 U. S. 275, 281.

Furthermore, under Illinois practice, constitutional questions not presented to the trial court cannot be raised *de novo* before the Illinois Supreme Court. *Foreman State Nat. Bank* v. *Sistek*, 358 Ill. 525, 529-30, 193 N. E. 513, 515; *People* v. *City of Waukegan*, 344 Ill. 60, 61, 175 N. E. 780; *D. L. Lee Pub. Co.* v. *St. Clair County*, 341 Ill. 257, 260, 173 N. E. 274, 275.

Only after the Illinois Supreme Court determined that the cause had been wrongfully appealed and ordered that cause transferred to the Appellate Court (App. A., pp. 25-26), did petitioner for the first time assert a constitutional question with regard to Judge Sbarbaro's role in the original divorce proceedings (Pet. App. III, p. 41). But petitioner concedes at p. 12 of her petition that the Appellate Court has no jurisdiction to entertain constitutional questions and this court has so acknowledged in previous cases coming from Illinois. *Parker* v. *Illinois*, 333 U. S. 571, 573-4; *Central U. Teleph. Co.* v. *Edwardsville*,

269 U. S. 190, 194; see also *Pantle* v. *Pantle*, 19 Ill. App. 2d 353, 367, 153 N. E. 2d 740, 748. The Appellate Court decision affirming the judgment of the trial court therefore was necessarily based on non-federal grounds and its opinion demonstrates this to be true.

Further, when petitioner sought leave to appeal from the judgment of the Appellate Court, the Illinois Supreme Court could not entertain any constitutional question which she chose to assert in her petition (Pet. App. IV, p. 42) because under state law that court is limited to review of only those questions properly raised and passed upon by the Appellate Court. *Christopher* v. *West*, 409 Ill. 131, 135, 98 N. E. 2d 722, 724; *People* v. *Seymour*, 272 Ill. 295, 300, 111 N. E. 1008, 1011; *Alton Banking and Trust Co.* v. *Gray*, 347 Ill. 99, 104, 179 N. E. 469, 471.

It thus appears that petitioner never asserted her present constitutional question either in the trial court or before the Illinois Supreme Court on her direct appeal and that no constitutional question of any kind was ever decided in this case.

To be sure petitioner raised another constitutional question in the amendment to her complaint and on her direct appeal to the Illinois Supreme Court but the only connection between that question and the one here presented concerning Judge Sbarbaro is that each purports to be based on the due process clause of the Fourteenth Amendment. This is not enough to confer jurisdiction on this Court. *Dewey* v. *Des Moines*, 173 U. S. 193.

II. THE CLAIMED CONSTITUTIONAL QUESTION HAS NO MERIT.

Under the facts shown in this record Judge Sbarbaro's activities induced by petitioner's own counsel did not constitute any denial of due process of law.

Judge Sbarbaro did not act as a judge in the divorce case. The case was heard and determined by Judge Sabath after a hearing at which petitioner was present and represented by counsel of her own choosing and at which Commander McDonald was represented by Irving Herriott. Sbarbaro was not even present at any divorce hearing (Ad. Ab. 756). This is conceded at page 6 of the petition, as follows:

> "Petitioner was represented by one Mr. Rathbun, a Chicago lawyer.
>
> "Mr. McDonald was represented by the counsel of record, none of whom was a judge of any court."

The petition then says:

> "But as an adjuvant to the services of his counsel of record, Mr. McDonald enlisted the services of John A. Sbarbaro, then a judge of the Superior Court of Cook County, in which court McDonald's suit was pending."

There is no evidence that McDonald enlisted Sbarbaro's services as an "adjuvant" or otherwise in the divorce proceedings. Sbarbaro became involved in conversations with the petitioner at the request of her own lawyer so that she could know first hand the nature of the charges she was facing if she attempted to retain custody of the minor children (Ad. Ab. 750). Further, the only way Sbarbaro acquired any contact with the matter was because petitioner's lawyer Rathbun wanted to use him as a conduit to carry his threats to McDonald. Sbarbaro was

merely a friend of McDonald's brought into the controversy solely at the inducement of petitioner and her counsel (Ad. Ab. 748, 750).

Finally, petitioner was represented by counsel of her own choosing at every contact with Sbarbaro. If Sbarbaro had used any coercive methods of any kind Rathbun was in a position to bring the matter to the attention of presiding Judge Sabath, where petitioner's rights would have been fully protected.

The cases cited by petitioner at page 14 of the petition obviously have no bearing on the facts presented by the instant record:

Tumey v. *Ohio*, 273 U. S. 510, involved a situation in which the judge had a financial interest in the matter he was hearing. What was involved there was a "temptation" that the presiding judge might "forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true. * * *" (273 U. S. at p. 532). Here Judge Sbarbaro was not hearing anything. The presiding judge was Judge Sabath. Judge Sbarbaro never appeared in any manner in the court proceedings. There is no showing on the record and none could be made that the late Judge Sabath had any interest of any kind in the outcome of the McDonald divorce case.

In Re Murchison, 349 U. S. 133, is equally inapposite. There a judge sitting as a one man jury charged a witness with perjury. The subsequent trial for contempt before the same judge who made the charge was held to constitute a denial of due process.

Judge Sabath preferred no charges against petitioner and was not "a judge in his own case." He had no interest in the outcome of the divorce proceedings. Obviously the instant case does not remotely resemble the situation in *Murchison*.

Without the support of any precedent and in the face of a record replete with findings of fact disproving the charge, the petitioner now says, "[d]enial of due process was inherent in the coercive effect * * *" (Pet., p. 15). Yet the trial court, affirmed by the Illinois courts of review, found as a fact that there was no coercion practiced on petitioner at the time of the divorce by McDonald "or anyone acting on his behalf." (Ad. Ab. 107.)

The trial court, affirmed by the Illinois courts of review, also found as a fact that there was no "showing of fraud or collusion made out against her attorney, Charles F. Rathbun; * * *" (Ad. Ab. 113.)

This leaves the case in a posture where petitioner and her attorney agreed to the property settlement and decree with full knowledge of the facts and of all of Sbarbaro's activities; where if there had been any fraud or coercion practiced on petitioner, her attorney Rathbun was in a position to bring the matter to the attention of Judge Sabath so that her rights could be protected. Now, sixteen years later petitioner for the first time claims that a conversation which she had with the late Judge Sbarbaro in the presence of her own lawyer and which was arranged and conducted by her lawyer, constitutes a denial of due process of law.

We submit there is no merit in the contention even if this court were in a position to hear all the facts *de novo*. However, petitioner concedes that "[t]his court will not weigh contradictory testimony or assess credibility upon controverted questions of objective fact." (Pet., p. 17.) She attempts to avoid the devastating effect of this concession by saying that the facts are "undisputed," but in truth the issue of whether or not petitioner was under any coercion at the time of the divorce takes up a substantial part of this 5,000 page record.

The Appellate Court disposed of this issue by saying that the trial judge could well have inferred that unless the charge of adultery "were true and she feared exposure, they would have had no effect upon petitioner and her parents, and in fact she would not have relinquished custody of her children in the first place" (Pet. App. I, p. 33). The court said further, "In any event, the trial judge had before him ample evidence to support the finding that petitioner was not mentally incompetent throughout the eleven year period and was not subjected to, or affected by, threats and pressures sufficient to constitute legal duress." (Pet. App. I, p. 33.)

At page 18 of the petition language from respondents' answer to the petition for leave to appeal is quoted to the effect that "the testimony of the judge [Sbarbaro] in his deposition completely destroys the petitioner's case." This statement referred to Judge Sbarbaro's testimony that at the time petitioner was trying to convince the trial court that she was so insane as to be a "basket case", she actually was as sane as anyone the judge had ever seen.

It should be borne in mind that this testimony was not proffered by the respondents but by the petitioner herself (Ad. Ab. 740-44, 748-58). Her own counsel read the deposition of Judge Sbarbaro into evidence and thereby sponsored the judge as her witness.* The judge did not give evidence "as a result of his conjoint use of his judge's robes, his license to practice law, and the privilege of attorney and client" (Pet., p. 18) but because the petitioner called him as

*Certain portions of the Sbarbaro deposition which petitioner attempted to delete (Ad. Ab. 744-748) were read in by respondent's counsel as part of petitioner's case pursuant to Illinois Supreme Court Rule 19-10(4) (Ill. Rev. Stat. (1961) Ch. 110, § 101.19-10(4)) which provides: "If only part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used."

her witness and read his testimony into the record. The fact that the evidence she sponsored destroyed her case cannot be charged to these respondents nor does this result constitute a denial of due process of law. Whatever difficulties Judge Sbarbaro's testimony created for petitioner was occasioned by her sponsoring his testimony which she did voluntarily and while represented by able and independent counsel.

III. THE DECISION BELOW RESTS ON ADEQUATE STATE GROUNDS.

In seeking to excuse her 11 year delay in instituting these proceedings petitioner first urged in the courts below that the challenged divorce decree was void and therefore subject to attack at any time. The Illinois courts found against her on this contention.

The Appellate Court in its opinion, which opinion the Illinois Supreme Court in effect affirmed by refusing to review it, held that the divorce decree was not void. The Appellate Court said (Pet. App. I, pp. 27-8):

> "It has long been the law of this state that a void judgment may be set aside at any time by motion or petition. * * * The error importing voidness, however, must be apparent from an examination of the record, as the court cannot review the evidence. * * * The record, in a chancery case, consists of the pleadings, process and decree (*Collins* v. *Collins*, 14 Ill. 2d 178, 183). * * *
>
> "It is clear from the record in the divorce proceedings that petitioner was personally served, that she stipulated to have the case heard as a default matter, and that she was represented by her counsel, at the hearing. The decree found, as alleged in the complaint, that * * * on, to wit, June 1, 1945, the defendant wilfully deserted and absented herself from the plaintiff without any reasonable cause, and without

fault on his part, and continued so to do without interruption for more than two (2) years since said date to the present time and the filing of the complaint herein.' Petitioner would have us declare that the trial judge found that the statutory grounds of desertion and entered the decree on the basis of mistaken judgment. This we cannot do. (*Van Dam* v. *Van Dam*, 21 Ill. 2d 212). Petitioner's right to seek review of the transcript of evidence, on appeal or by writ of error, has long since passed. The record does not show on its face that the divorce decree was erroneous."

Petitioner next alleged below that even if the divorce decree were not void but voidable only, her complaint to vacate that decree pursuant to Civil Practice Act, § 72, was not barred because the two-year limitations provision in that statute was tolled by reason of mental disability and duress practiced upon her by McDonald. All courts below also found against petitioner on this contention. In its opinion the Appellate Court said (Pet. App. I, pp. 30, 33):

"The petition in the instant case was filed more than eleven years after the entry of the divorce decree. At no time during that period did petitioner seek relief by way of a bill of review or writ of error *coram nobis*. Both of these procedural methods, upon which the period of limitation was one year, were superseded by the unified procedure provided in Sect. 72 of the Civil Practice Act which became effective on January 1, 1956. The part of that section pertinent here reads:

'(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.'

"The instant petition was filed neither within the limitation period provided under the former practice nor within that afforded by Sect. 72(3). Petitioner claims that the limitation period was tolled because of the continuing duress exerted over her by respondent,

which did not terminate until May of 1958, when the respondent died. . . .

"• • • In any event, the trial judge had before him ample evidence to support the finding that petitioner was not mentally incompetent throughout the eleven year period and was not subjected to, or affected by, threats and pressures sufficient to constitute legal duress. Accordingly, it is our view that the trial judge properly determined that the period of limitations under 72(3) was not tolled and that petitioner's claim is therefore barred."

Thus all the courts of Illinois have held unequivocably that petitioner's complaint to set aside a divorce decree found not to be void was barred by limitations and laches. Unless this Court is prepared to review and reverse the courts of Illinois on these questions of state law, nothing remains to be decided in this case.

On more than one occasion this Court has observed that even meritorious constitutional claims can be lost if not asserted in time. As stated in *Yakus* v. *United States*, 321 U. S. 414, 444-5:

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. • • • While this court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, • • •".

As a result limitations and laches have been recognized as a wholly adequate state grounds for decision, barring review of companion federal questions by this Court. See *Garr, Scott & Co.* v. *Shannon*, 223 U. S. 468, where it is stated at p. 470:

"• • • [A]s repeatedly ruled, where a state court has

> decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the Federal questions, even though they may have been actually considered and determined adversely to his contention. * * * The principle has been enforced in cases where the ruling of the state court was based on the application of the doctrine of *res judicata*, laches, statute of limitations, and others. * * *"

To the same effect see *Wood* v. *Chesborough*, 228 U. S. 672; *Preston* v. *Chicago*, 226 U. S. 447.

Petitioner now urges a further contention never presented in the courts below to avoid the limitations provision of Civil Practice Act, § 72(3). She says now for the first time that "[t]he denial of due process continued until the death of the husband in 1958," because a confidential relationship "in the nature of an attorney-client relationship existed between McDonald and Judge Sbarbaro." (Pet., pp. 21-2). This is a complete *non sequitur*.

How any conduct of Judge Sbarbaro eleven years before the instant proceedings were instituted could fatally affect these proceedings is not pointed out. Nor is the fact that Sbarbaro was a friend of McDonald's and from time to time advised him on personal matters of any significance. Obviously Sbarbaro was not practicing law but even if he had been it would have had no significance here because he was not hearing the matter as a judge or appearing on Mr. McDonald's behalf.

The courts below found as a further and separate ground for decision that by virtue of her acceptance of a substantial property settlement and her reliance on the divorce decree in effecting remarriage petitioner was estopped from attacking the validity of that divorce decree. The Appellate Court said (Pet. App. I, p. 34):

> "* * * Petitioner accepted the proceeds of the prop-

> erty settlement and put them to her own use. As respondent had died when petitioner filed her claim, no question of her status as a wife is involved. All she seeks is an additional portion of respondent's assets. Petitioner remarried in 1956 thereby relying upon and asserting the validity of the divorce decree. Her second marriage continued to exist in all respects at the time she filed this petition in 1958. She had not annulled it, nor had she disavowed it in any way at any time other than in the instant suit which was filed solely for the purpose of obtaining part of respondent's estate. The rule of estoppel, founded upon the public policy of protecting the marital status and good character of innocent third persons, the legitimacy of children, and the rights and position of persons whose status has been finalized by decree of divorce, will not permit parties to assert inconsistent legal rights as petitioner has here attempted. Under the facts of this case the rule of estoppel was appropriately applied."

In the face of this holding petitioner states that the substantive law of some states "is such that remarriage of a party to a voidable or even a theretofore absolutely void decree of divorce works a 'waiver' or 'estoppel' so that the remarried spouse cannot attack the divorce. But Illinois is not one of the States adhering to this rule." (Pet., p. 19). This contention rests upon her unsound argument concerning *Collins* v. *Collins*, 14 Ill. 2d 178, 151 N. E. 2d 813.

In the instant case the Appellate Court of Illinois distinguished the *Collins* case as follows (Pet. App. I, p. 35):

> "In *Collins* the Court's language concerning the effect of petitioner's remarriage upon her rights to collaterally attack the decree was stripped of its significance when the Court pointed out that 'this issue was not presented to the lower court for consideration, and is obviously waived.' *Collins* v. *Collins*, 14 Ill. 2d 178, 185."

Since the Supreme Court of Illinois refused to grant leave to appeal in the instant case, it must have agreed with the comment of the Appellate Court with reference to *Collins** and its decision on the issue of estoppel.

Further, this Court has recognized in precisely this type of case that estoppel constitutes an adequate state ground for decision. In *Israel* v. *Arthur*, 152 U. S. 355, it was decided that no reviewable federal question was presented by a state court judgment which held a woman estopped to contest the validity of a divorce decree under which she had profited and had exercised the privilege of remarriage despite her contention that the decree was void and amounted to a denial of due process of law, the court stating, at p. 362:

> "To review that judgment would be to overhaul the application by a state court of principles of public policy and of estoppel, which is not within our province to do."

CONCLUSION.

We most respectfully submit that petitioner's present due process contention is an afterthought never properly presented for review before the Supreme Court of Illinois and in any event is barred by limitations, laches, and estoppel. For the reasons given herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS C. MCCONNELL,
134 South La Salle Street,
Chicago 3, Illinois,
Counsel for Respondents.

January 19, 1963.

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* In the later case of *Van Dam* v. *Van Dam*, 21 Ill. 2d 212, 218, 171 N. E. 2d 594, 598, the Illinois Supreme Court itself said that *Collins* should only be regarded as a precedent on the special factual showing there involved.

APPENDIX A.

Per Curiam Opinion of Illinois Supreme Court Denying Direct Appeal and Transferring Cause to Appellate Court, First District.

STATE OF ILLINOIS, }
SUPREME COURT. } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of September in the year of our Lord, one thousand nine hundred and sixty, within and for the State of Illinois.

Present: Walter V. Schaefer, Chief Justice.
Justice Joseph E. Daily Justice George W. Bristow
Justice Harry B. Hershey Justice Ray I. Klingbiel
Justice Byron O. House Justice Roy J. Solfisburg, Jr.

William L. Guild, Attorney General.
Robert G. Miley, Marshal.

Attest: Mrs. Earle Benjamin Searcy, Clerk.

BE IT REMEMBERED, that, to-wit: on the 21st day of September, A. D. 1960, the same being one of the days of the term of court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

EUGENE F. McDONALD, JR.
vs.
INEZ RIDDLE McDONALD

INEZ RIDDLE McDONALD NEALE,
Appellant,
vs.
EUGENE M. KINNEY AND EDWARD McCAUSLAND, Co-Executors of the Will of EUGENE F. McDONALD, JR., Deceased,
Appellees.

No. 36111

Appeal from Superior Court, Cook County.

47 S 12849.

And now, on this day, the Court having diligently examined and inspected the record and proceedings aforesaid, together with the motion by appellees that this cause be transferred, and now being fully advised in the premises is of the opinion, find and adjudge that this case was wrongfully appealed to this Court.

THEREFORE, it is ordered by the Court that this case be and the same is hereby transferred to the Appellate Court for the First District of the State of Illinois, and the Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the Clerk of said Appellate Court.

APPENDIX B.

Illinois Civil Practice Act, § 72.

(Ill. Rev. Stat. (1961) Ch. 110, § 72.)

Relief from Judgments and Decrees.

(1) Relief from final orders, judgments and decrees, after 30 days from the entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis and coram vobis, writs of audita querela, bills of review, and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for said relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order, judgment or decree from which relief is sought or of the proceedings in which it was entered. There shall be no distinction among actions at law, suits in equity and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(2) The petition must be filed in the same proceeding in which the order, judgment or decree was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently

concealed shall be excluded in computing the period of 2 years.

(4) The filing of a petition under this section does not affect the order, judgment or decree, or suspend its operation.

(5) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order, judgment or decree pursuant to the provisions of this section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order, judgment or decree but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order, judgment or decree.

(6) Any order entered denying or granting any of the relief prayed in the petition is appealable.

(7) Nothing contained in this section affects any existing right to relief from a void order, judgment or decree, or to employ any existing method to procure that relief.

Illinois Civil Practice Act, § 75(1).

(Ill. Rev. Stat. (1961) Ch. 110, § 75(1).)

providing in pertinent part:

Jurisdiction of Appellate and Supreme Courts.

(1) Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a *construction of the constitution is involved.* . . . [Emphasis supplied.]

Illinois Supreme Court Rule 39.

(Ill. Rev. Stat. (1961) Ch. 110, § 101.39.)

providing in pertinent part:

Briefs.

(1) * * *.

In all cases of appeal to this court, directly from the trial court or as a matter of right from the Appellate Court, there shall be set forth, preceding the Points and Authorities and under an appropriate heading a clear and concise statement of the grounds relied upon to warrant this court in entertaining jurisdiction of the appeal.

IV. * * *.

No alleged error or point not contained in the brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing.

Illinois Supreme Court Rule 47.

(Ill. Rev. Stat. (1961) Ch. 110, § 101.47.)

Transferred Causes.

If any cause is appealed to this court which should have been appealed to an Appellate Court, or vice versa, it may be transferred to the proper court on motion, and upon an order for transfer being made all documents already filed shall be transmitted by the clerk to the proper court. The case shall proceed from that point in all respects as though the appeal had originally been taken to the proper court.

APPENDIX C.

Motion to Transfer Appeal From Illinois Supreme Court to Illinois Appellate Court, First District, for Lack of a Constitutional Question.

IN THE SUPREME COURT OF ILLINOIS.

INEZ RIDDLE MCDONALD NEALE, *Petitioner-Appellant,* *vs.* EUGENE M. KINNEY and EDWARD MCCAUSLAND, Co-Executors of the Will of EUGENE F. MCDONALD, JR., Deceased, *Respondents-Appellees.*	Appeal from the Superior Court of Cook County. Honorable Thaddeus V. Adesko, Presiding Judge.

MOTION TO TRANSFER APPEAL.

Now Come Appellees, Eugene M. Kinney and Edward McCausland, Co-Executors of the Will of Eugene F. McDonald, Jr., Deceased, by their attorney, Thomas C. McConnell, and move, pursuant to Rule 47 of the Supreme Court Rules, that this Appeal be transferred to the Appellate Court, First District, for the reason that no question concerning construction of the constitution is presented so as to give this court jurisdiction on direct appeal pursuant to Civil Practice Act, Section 75(1).

APPENDIX D.

Petitioner's Brief in Opposition to Motion to Transfer Appeal From Illinois Supreme Court to Appellate Court, First District, pp. 10, 11.

II.

THE DECISION OF THE TRIAL COURT WHICH UPHOLDS THE ALLEGEDLY VOID DECREE OF DIVORCE, RAISES A FAIRLY DEBATABLE CONSTITUTIONAL QUESTION.

The respondents greatly oversimplify the matter presently before the Court when they state, in their "Suggestions," that appellant's petition raised no debatable constitutional question, but raised "only a question concerning the validity of the divorce decree." It is true that the validity of the divorce decree is under attack. The constitutional question, of course, is not patent from so cursory a statement of the case. The constitutional question is, however, glaringly involved in the asserted grounds for the invalidity of said divorce decree.

The petition contended that appellant was deprived of her rights of property without due process of law in that such deprivation was pursuant to a decree which was void because obtained by perjury and fraud and because the court lacked the inherent power to enter such decree. The petitioner was also deprived of her rights of property without due process of law because said decree was obtained through collusion and conspiracy, at a time when petitioner was mentally incompetent, and under circumstances amounting to a denial of counsel.